

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 02-0392 & 02-0390**  
**SALES TAX**  
**For Years 1997, 1998, 1999, and 2000**

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**ISSUES**

**I. Tax Administration – Waiver of Penalty**

**Authority:** 45 IAC 15-11-4; 45 IAC 15-5-7(3); IC § 6-8.1-10-4

Taxpayer seeks waiver of the penalties because the tax liabilities were not due to fraudulent intent.

**STATEMENT OF FACTS**

Taxpayer formed a partnership for a sign business in 1997. Taxpayer then reorganized into a LLC in April of 1998. Taxpayer conducted business and invoiced customers for retail sales tax throughout the years at issue but did not register as a retail merchant or start remitting the collected sales tax to the state until 1999 and 2000. An audit determined the amount at issue and a 100% fraud penalty was assessed. Taxpayer protests only the fraud penalty, arguing that an accountant reviewed and filed returns for them for the years in question.

**I. Tax Administration – Waiver of Penalty**

**DISCUSSION**

Finding the liabilities were due to taxpayer's failure to pay taxes with "the fraudulent intent of evading the tax" IC § 6-8.1-10-4, the Department imposed a one hundred percent penalty. "Fraudulent intent" is defined in 45 IAC 15-11-4, pertinently, as;

An act is fraudulent if it is an actual, intentional wrongdoing, and the intent required is the specific purpose of evading tax believed to be owing.

Five elements are required by 45 IAC 15-5-7(3) to establish the taxpayer's actions as fraudulent, these items are:

- (A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations.

Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

Taxpayer made no filings and did not register as a retail merchant for either entity during the first two years of the period at issue.

- (B) **Scienter:** This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

The income generated was generated by retail sales, receipts from which showed a charge for sales tax. Taxpayer presents no evidence of any payment of the required sales tax, and taxpayer's knowledge of this requirement is evident from taxpayer's collection of it throughout the audit period, but not remitting any of the amounts collected until the 1999 transactions.

- (C) **Deception:** Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

Taxpayer's failure to register either entity or file monthly sales tax returns caused the department to believe no retail sales were occurring until taxpayer began reporting and remitting in 1999 and 2000.

- (D) **Reliance:** Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

As was noted under deception, the taxpayer's actions prevented the department's receipt of the tax already collected but never reported or remitted for 1997 and 1998.

- (E) **Injury:** The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

No tax was collected on the retail sales, thus the money which properly belongs to the state of Indiana was not paid, although taxpayer did collect money for this from customers for 1997 and 1998 without remitting the money to the state.

Taxpayer operated a substantial business operation, incorporating and expanding the operation over the period at issue. All aspects of the business operation that are available indicate that taxpayer was a capable business operator who deliberately maintained an operation with minimal and even misleading documentation of income and business arrangements. Taxpayer provides no

evidence that his business's retail sales were ever voluntarily reported, the tax was only assessed after the retail sales were discovered as part of an audit. Aside from arguing that an accountant was responsible, taxpayer offers no explanation for the failure to register as a retail merchant or to report and pay the sales tax even though it was collected from customers. Taxpayer's actions were intentional and actual wrongdoing was conducted over the first two years covered by the audit, and the logical result of these actions was for the specific purpose of evading taxes. Consequently, the fraud penalty is appropriate for 1997 and 1998, but not 1999 and 2000 when taxpayer was reporting and remitting sales tax on transactions.

### **FINDINGS**

Taxpayer's protest is denied as to the penalty for 1997 and 1998, sustained as to 1999 and 2000.

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